Never Have So Many Been Punished So Much by So Few: Examining the Constitutionality of the New Special Court-Martial

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Introduction

Since its creation by Congress in 1916, the special court-martial (SPCM) has been a judicial forum favored by commanders for disposing of relatively minor offenses.[1] In fiscal year 2002, the Army, Navy, Marine Corps, Air Force, and Coast Guard convened 5052 courts-martial, 3197 of them SPCMs.[2] In the military justice system, a system that does not distinguish felony offenses from misdemeanors, the SPCM has filled a role roughly analogous to a misdemeanor-level criminal court. The SPCM provides an accused fewer procedural safeguards than are available at a general court-martial (GCM). An accused at a SPCM is not entitled to an investigation of his offenses pursuant to Article 32 of the Uniform Code of Military Justice (UCMJ).[3] An accused at a SPCM may face trial sooner after having been served with charges than at a GCM.[4] The military judge presiding over a SPCM is not required to be qualified in accordance with the requirements placed on GCM-certified military judges under Article 26(a), UCMJ.[5] Perhaps most significantly, the minimum number of members required to hear SPCMs is three, compared to the five members required at a GCM.[6]

Whatever an accused loses in the way of procedural safeguards at a SPCM, the SPCM traditionally was a much more desirable forum for an accused than the GCM because of the reduced risk to the accused at a SPCM. From 1916 until May 2002, SPCMs were not authorized to award confinement for any period longer than six months.[7] Any non-capital offense may be tried by SPCM, and even some offenses for which death is an authorized sentence may be tried by SPCM.[8] The offenses tried at SPCMs often carry maximum punishments that include confinement for more than six months, but no matter what maximum punishment is authorized for an offense being tried, the punishment at a SPCM never exceeds the maximum punishment associated with that forum. Thus, the maximum sentence associated with the SPCM forum, rather than the maximum authorized for particular offenses, is frequently the relevant limit on the sentencing discretion of SPCMs.[9]

Between 1999 and 2002, the accused at a SPCM lost some of the benefit of this safety net. On 17 May 1999, the Senate Committee on Armed Services report on the fiscal year 2000 defense authorization bill included a provision increasing the jurisdictional maximum sentence that can be imposed by SPCMs that use a military judge. The committee did not report any findings or rationale supporting the amendment.[10] The Senate passed the defense authorization bill, including the amendment to Article 19, on 27 May 1999.[11] Although the House of Representatives bill contained no similar provision,

1. Articles of War of 1916, ch. 418, § 3, art. 3, 39 Stat. 651 (1916).

2. U.S. Dep't of Navy, Office of the Judge Advocate General, *Code 20 News-Mailer 2003-04: Military Justice Statistical Trend Analysis for Fiscal Year 2002* (Mar. 4, 2003). This figure does not include summary courts-martial, which have been held to be non-adversarial proceedings distinct from criminal trials. Middendorf v. Henry, 425 U.S. 25, 40-41 (1976).

3. UCMJ art. 32 (2002).

4. *Id.* art. 35.

5. *Id.* art. 26(a).

6. *Id.* art. 16.

7. Articles of War of 1916, ch. 418, § 3, art. 13, 39 Stat. 652 (1916); UCMJ art. 19; MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(f)(2)(B) (2000) [hereinafter 2000 MCM]. Hard labor without confinement for no more than three months, forfeiture of pay not exceeding two-thirds pay per month for six months, reduction in grade, and a bad-conduct discharge (BCD) were the other maximum punishments that a SPCM could impose until the May 2002 change in the jurisdictional maximum of the SPCM. *Id.*

8. UCMJ art. 19; MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(f)(2)(C)(i) (2002) [hereinafter MCM].

9. *Compare* MCM, *supra* note 8, app. 12 (Maximum Punishment Chart), *with* UCMJ art. 19.

10. S. REP. NO. 106-50, at 307-08 (1999).

11. 145 CONG. REC. S6274 (daily ed. May 27, 1999).

the House conceded the point in conference.[12] The House[13] and the Senate[14] passed the authorization bill as reported by the conference committee. At no time did Congress make the amendment to Article 19 the subject of findings or debate. President Clinton signed the authorization bill into law on 5 October 1999.[15]

The 1999 amendment to Article 19 did not immediately affect the jurisdictional maximum of SPCMs. Because the jurisdictional maximum punishment of the SPCM is capped by rule as well as by statute, SPCMs were still only authorized to award six months of confinement by rule, even after Congress provided for the increased sentencing authority.[16] This changed in 2002 when the President amended Rule for Courts-Martial (RCM) 201(f)(2)(B) to permit SPCMs to award up to one year of confinement.[17] The amendment took effect on 15 May 2002.[18]

On one hand, the change in the SPCM may be seen as another step, for good or for ill, in the continued "civilianization" of the military justice system—a process most view as generally beneficial to the accused.[19] "Misdemeanor" courts-martial are simply now capable of awarding the same term of confinement that civilian courts may impose when sentencing a defendant for a misdemeanor.[20] But when viewed in the context of protections historically offered to accused, permitting a panel of three members to convict an accused of an offense punishable by a maximum term of confinement of one year marks a new low point in the protection afforded an accused. This article argues that the new SPCM should be held to be unconstitutional under the Due Process Clause of the Fifth Amendment.[21]

The analysis employed in this examination follows the example of the Supreme Court by relying extensively on the history of court-martial practice as well as an examination of the fairness of the current practice. In light of the Court's analysis, this article questions whether the factors militating in favor of larger court-martial panels in cases where a year of confinement is at stake are so weighty as to overcome Congress's broad prerogative to establish procedures for courts-martial. The article concludes that the effect of a deliberating body's size on the reliability of that body's determinations—especially when viewed in light of the long history of court-martial practice—forbids the use of three-member panels in trials carrying the possibility of confinement for one year.

The Standard to Be Applied

The Constitution gives Congress the authority to make rules for the government and regulation of the military.[22] Judicial deference "is at its apogee" when courts review congressional decision-making regarding the government of the military.[23] Courts view themselves as particularly incompetent to substitute their own judgments for those of Congress in military matters;[24] therefore, they give particular deference to the determinations of Congress when reviewing legislation concerning the government of the military.[25] Nonetheless, because a military accused is subject to loss of liberty or property at a

12. H.R. CONF. REP. NO. 106-301, at 742 (1999).

13. 145 CONG. REC. H8318 (daily ed. Sept. 15, 1999).

14. 145 CONG. REC. S11201 (daily ed. Sept. 22, 1999).

15. Statement on Signing the National Defense Authorization Act for Fiscal Year 2000, 34 WKLY. COMP. PRES. DOC. 1927 (Oct. 6, 1999).

16. 2000 MCM, *supra* note 7, R.C.M. 201(f)(2)(B). Statutory provisions for increases in the jurisdictional maximum sentences for other forms of punishment, such as duration of forfeiture of pay, were also not applicable to SPCMs during this time. *See id.*; *cf.* UCMJ art. 19 (2000).

17. Exec. Order No. 13,262, 67 Fed. Reg. 18,773 (2002); MCM, *supra* note 8, R.C.M. 201(f)(2)(B).

18. 67 Fed. Reg. at 18,773; *see also* Taylor v. Garaffa, 57 M.J. 645 (N-M. Ct. Crim. App. 2002) (holding that the new jurisdictional maximum applies to offenses committed before the effective date of the executive order if the court-martial was convened after the effective date).

19. *See, e.g.*, United States v. Jones, 7 M.J. 806, 808-11 (N.M.C.M.R. 1978).

20. The term *misdemeanor* is meant here to correspond to that set of offenses less severe than felonies, which are typically punishable by imprisonment for a term exceeding one year. *See, e.g.*, MODEL PENAL CODE § 1.04(2); 18 U.S.C. § 3559(a) (2000).

21. *See* U.S. CONST. amend. V.

22. *Id*. art. I, § 8, cl. 14.

23. Rostker v. Goldberg, 453 U.S. 57, 70 (1981).

24. Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence.").

25. *See, e.g.*, *Rostker*, 453 U.S. at 65-66. Because the right to trial by jury has never been held to apply to courts-martial, an accused must look to the Fifth Amendment Due Process Clause for a guarantee of a minimum number of members. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866).

court-martial, he or she is entitled to the protections afforded by the Due Process Clause of the Fifth Amendment.[26]

The Supreme Court evaluates due process challenges to court-martial procedure under the standard announced in *Middendorf v. Henry*[27] and *Weiss v. United States*.[28] In *Middendorf*, the Court considered whether the Due Process Clause required that service members appearing before summary courts-martial be assisted by counsel.[29] The question in *Middendorf* was answered in the negative when the Court decided that "the factors militating in favor of counsel at summary courts-martial [were not] so extraordinarily weighty as to overcome the balance struck by Congress."[30] In coming to this conclusion, the Court considered the effect participation of counsel would have on summary courts-martial.[31] Participation of counsel, the Court feared, would turn the brief, informal summary court-martial into "an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried."[32] The Court also considered that the accused has the option of refusing trial by summary court-martial and proceeding to trial in a forum in which he may have counsel.[33]

In *Weiss v. United States*,[34] the Court clarified and elaborated on the test first announced in *Middendorf*. In *Weiss*, service members convicted at courts-martial argued that the lack of fixed terms of office for military judges violated the Due Process Clause of the Fifth Amendment.[35] The petitioners in *Weiss* urged that because a military judge's superiors could remove a military judge at will, military judges lacked sufficient independence to ensure impartiality.[36] Again, the Court asked whether the factors militating in favor of a fixed term of office for military judges were so extraordinarily weighty as to overcome the balance struck by Congress.[37] The *Weiss* Court, however, answered the question by considering the historical and current military practices used to guarantee the independence of military courts.[38]

The Court began its due process analysis in *Weiss* by reviewing military practice dating back to early English military tribunals.[39] The Court observed that Anglo-American courts-martial had not historically relied on tenured military judges, and noted that Congress did not even create the position of military judge until 1968.[40] Thus, courts-martial had functioned for a majority of the country's history without any judge at all.[41]

Beyond examining the history of the questioned procedural practice, the *Weiss* Court examined the UCMJ and its corresponding regulations in their entirety to assess the degree to which the challenged scheme ensured judicial independence, and therefore judicial impartiality.[42] The Court began by noting that by placing judges under the control of the services' respective Judge Advocates General, who (according to the Supreme Court) had no interest in the outcome of any particular court-martial, Congress had "achieved an acceptable balance between independence and accountability."[43] The Court considered the protections against unlawful command influence

26. Middendorf v. Henry, 425 U.S. 25, 43 (1976).

27. *Id.*

28. 510 U.S. 163, 177-78 (1994).

29. *Middendorf*, 425 U.S. at 33.

30. *Id.* at 44.

31. *Id.* at 45-46.

32. *Id.* at 45.

33. *Id.* at 46-47.

34. 510 U.S. 163, 177-81 (1994).

35. *Id.* at 165.

36. *Id.* at 178.

37. *Id.* at 177-79.

38. *Id.* at 178-81.

39. *Id.* at 179.

40. *Id.* at 178-79.

41. *Id.*

42. *Id.* at 179.

provided by Articles 26 and 37, UCMJ, which forbid convening authorities from preparing fitness reports of military judges, and from censuring, reprimanding, or admonishing military judges with respect to the exercise of their judicial functions.[44] The Court noted that an additional punitive article prohibiting the knowing and intentional failure to comply with Article 37 braced this system of codal safeguards.[45] Finally, the *Weiss* Court noted that the Court of Military Appeals (now called the Court of Appeals for the Armed Forces), composed of civilian judges serving terms of fifteen years, oversaw the functioning of the military justice system. The Supreme Court commented favorably on that court's "vigilance in checking any attempts to exert improper influence over military judges."[46]

Because a structurally independent judiciary was not a historically important aspect of the military justice system, and because other procedural safeguards ensured judicial impartiality, the Supreme Court found that the petitioners in *Weiss* failed to demonstrate that the factors favoring fixed terms of office for military judges were "so extraordinarily weighty as to overcome the balance achieved by Congress."[47]

Although the *Middendorf* and *Weiss* opinions (both authored by now-Chief Justice Rehnquist) both sought to determine whether the factors militating in favor of the petitioner's claimed procedural protection were sufficiently weighty to overcome the balance struck by Congress, the two opinions arrived at the same conclusion in different ways. *Middendorf* evaluated the effect the desired procedural safeguard (counsel at summary courts-martial) would have on the administration of military justice, as well as the ability of the accused to obtain the safeguard at another forum.[48] *Weiss* evaluated the place the questioned procedural protection (tenured judges) held within the long tradition of Anglo-American military justice and evaluated other legal and regulatory safeguards that may tend to serve the same purpose as the procedural requirement claimed by the petitioners.[49] Taken together, these opinions pose a set of questions whose answers control whether a procedural protection claimed as a right under the Due Process Clause will outweigh Congress's deference toward military discipline:

> (1) Has the questioned procedural protection traditionally been a source of protection to the accused throughout the history of Anglo-American military justice?[50]
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> (2) Is a mechanism already in place for an accused to secure the desired procedural protection through the election of another forum?[51]
>
> (3) What effect would the desired procedural protection have on the ability of the military to efficiently and appropriately discipline its members?[52]
>
> (4) Do other protections already in place sufficiently safeguard the interest of the accused that would be advanced by the questioned procedural protection?[53]

The historical import of the questioned procedural safeguard within the tradition of Anglo-American courts-martial is arguably the most important factor. In *Weiss*, Justice Scalia, joined by Justice Thomas, disagreed that the Court should undertake any independent review of the balance the Congress struck in creating military justice procedures, stating,

> As sometimes ironically happens when judges seek to deny the power of historical practice to restrain their decrees, the present judgment makes no sense except as a consequence of historical practice. . . . [N]o one can suppose that similar protections against improper influence would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure

43. *Id*. at 180.

44. *Id*.

45. *Id*.; *see* UCMJ art. 98 (2002).

46. *Weiss*, 510 U.S. at 181.

47. *Id*.

48. Middendorf v. Henry, 425 U.S. 25, 45-48 (1976).

49. *Weiss*, 510 U.S. at 178-81.

50. *Id.* at 178-79.

51. *Middendorf*, 425 U.S. at 46-47.

52. *Id.* at 45-46.

53. *Weiss*, 510 U.S. at 179-81.

> of the Executive. I am confident that we would not be satisfied with mere formal prohibitions in the civilian context, but would hold that due process demands the *structural* protection of tenure in office, which has been provided in England since 1700, and is provided in all the States today. . . .
>
> Thus, while the Court's opinion says that historical practice is merely "a factor that must be weighed in [the] calculation," it seems to me that the Court's judgment today makes the fact of a differing military tradition utterly conclusive.[54]

Evaluating the New Special Court-Martial Under *Middendorf* and *Weiss*

Practitioners must now evaluate the new SPCM, which allows a panel of only three members to convict an accused and award one year of confinement, to determine whether the factors militating against the new jurisdictional maximum are so extraordinarily weighty as to overcome the balance struck by Congress.[55] This article addresses this issue using the four questions the Supreme Court used to evaluate military procedures under the Due Process Clause.

Question One: Has the Questioned Procedural Protection Traditionally Been a Source of Protection to the Accused Throughout the History of Anglo-American Military Justice?[56]

No precedent exists in Anglo-American military justice for subjecting service members to conviction and confinement for longer than six months by court-martial panels consisting of three officers. Modern American courts-martial trace their origins to the passage of the first British Mutiny Act of 1689 and successive British Articles of War.[57] The British Mutiny Act and its successors provided for the trial of military offenses by a panel of at least thirteen officer members.[58] This system was transplanted to the American colonies before the American Revolution.[59]

The Continental Congress based the American Articles of War of 1775 largely on the British Articles of War of 1765, which were in force in America at the beginning of the Revolution.[60] The most serious offenses were reserved for trial by general courts-martial, which could consist of no less than thirteen members. Less serious offenses were triable by regimental courts-martial, which could be composed of as few as five members, and which could impose no confinement in excess of thirty days.[61] In 1786, the Continental Congress relaxed the requirement for thirteen members in general courts-martial, providing for trial by a GCM composed of as few as five members when thirteen officers could not be convened without manifest injury to the service.[62] At the same time, Congress reduced the panel size of regimental courts-martial from five members to three.[63] In 1827, the Supreme Court held that a commander's determination that manifest injury to the service would not occur was not reviewable by civilian courts.[64]

In 1916, Congress instituted the three types of courts-martial familiar to military practitioners today. General courts-martial, which could impose any lawful punishment, consisted of between five and thirteen members.[65] At the same time, Congress introduced the SPCM, consisting of at least three members and capable of adjudging confinement of up to six months.[66] Minimum panel sizes remained the same when the Uniform Code of Military Justice (UCMJ) superseded the Articles of War.[67]

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54. *Id*. at 198-99 (Scalia, J., concurring) (citations omitted) (emphasis and alteration in the original).

55. *See id*. at 177-78.

56. *Id*. at 178-79.

57. 1 W. & M., c. 5 (Eng.); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 19 (2d ed. 1920).

58. 1 W. & M., c. 5, § 4 (Eng.), *reprinted in* WINTHROP, *supra* note 57, at 929.

59. WINTHROP, *supra* note 57, at 47.

60. *Id*. at 45, 931.

61. *See* American Articles of War of 1775, 2 J. Cont. Cong. 111-23 (1775), *reprinted in* WINTHROP, *supra* note 57, at 953.

62. American Articles of War of 1786, art. 1, 30 J. Cont. Cong. 316 (1786), *reprinted in* WINTHROP, *supra* note 57, at 972.

63. American Articles of War of 1786, art. 3, 30 J. Cont. Cong. 317 (1786), *reprinted in* WINTHROP, *supra* note 57, at 972.

64. Marvin v. Mott, 25 U.S. 19, 34-35 (1827).

65. Articles of War of 1916, ch. 418, § 3, art. 3, 39 Stat. 651 (1916).

Although the modern UCMJ descended from Army practice and the Articles of War rather than from naval practices,[68] a brief examination of naval court-martial panel size completes the historical review of court-martial panel size through American history. Naval courts-martial were governed by the *Rules for the Regulation of the Navy of the United Colonies*, adopted by the Continental Congress in 1775.[69] These rules, drafted by John Adams, were a somewhat more lenient abridgment of the British Naval Discipline Act, passed by the British Parliament in 1749.[70] The British statute permitted between five and thirteen members to award all legal punishments;[71] the American rules required a minimum of six members.[72] The deterioration of the Continental fleet by the end of the war, however, made convening courts-martial difficult. After a series of losses culminating in the September 1781 capture of the Continental frigate *Trumbull*, the fleet consisted of only two vessels.[73] In 1782, Robert Morris, the Agent of Marine to the Continental Congress,[74] reported that "the present Situation of the Navy will very seldom admit of holding Courts Martial or Courts of Enquiry for the want of sufficient officers."[75] On 12 June 1782, the Continental Congress provided for the trial of non-capital cases by panels of three officers,[76] a practice that remained until the last vessel of the Continental Navy was sold in 1785.[77]

Whether confinement was a punishment naval courts-martial would have imposed during this time is harder to determine. Although the British Naval Discipline Act allowed courts-martial to award up to two years of confinement, the American rules did not specifically provide for confinement of sailors or Marines as a court-martial punishment.[78] In both the British and American navies at the time of the Revolution, punishment was virtually synonymous with flogging.[79] Confinement did not become a common American naval punishment until well after flogging was abolished in 1850.[80] The papers of the Continental Congress reveal no instance of any naval court-martial of fewer than six members imposing confinement as punishment, or, for that matter, imposing corporal punishment.[81]

When the federal Navy was established in 1798, naval courts followed the British naval and American Army examples, requiring panels of five to thirteen officers.[82]

Thus, a thorough review of the history of Anglo-American military and naval courts-martial reveals no evidence that panels of fewer than five members have ever awarded sentences to confinement for more than six months. Service members have historically enjoyed the right to larger panels when tried by

66. *Id.* arts. 9, 13.

67. UCMJ art. 19 (1951); *cf.* UCMJ art. 19 (2002).

68. *See* United States v. Culp, 33 C.M.R. 411, 427 (C.M.A. 1963).

69. 3 J. CONT. CONG. 378 (1775).

70. CHARLES OSCAR PAULLIN, THE NAVY OF THE AMERICAN REVOLUTION 46-47 (1971).

71. An Act for Amending, Explaining and Reducing into One Act of Parliament, the Law Relating to the Government of His Majesty's Ships, Vessels and Forces by Sea, 22 Geo. 2, c. 33 § 12 (Eng.) [hereinafter British Admiralty Act].

72. 3 J. CONT. CONG. 382-83 (1775).

73. STEPHEN HOWARTH, TO SHINING SEA: A HISTORY OF THE UNITED STATES NAVY, 1775-1998, at 45 (1999).

74. As Agent of Marine, Morris served as head of the Naval Department overseeing naval matters for the Continental Congress. PAULLIN, *supra* note 70, at 223.

75. Robert Morris, *Report to Congress on Naval Courts-Martial*, *in* 5 THE PAPERS OF ROBERT MORRIS 1781-84, at 300 (E. James Ferguson & John Catanzariti eds., 1980).

76. 22 J. CONT. CONG. 325 (1782).

77. HOWARTH, *supra* note 73, at 48.

78. *Compare* British Admiralty Act, *supra* note 71 ("Provided always, That no Person convicted of any Offense shall, by the Sentence of any Court-martial to be held by virtue of this Act, be adjudged to be imprisoned for a longer Term than the Space of two Years."), *with* Rules for the Regulation of the Navy of the United Colonies, 3 J. CONT. CONG. 378 (1775).

79. N.A.M. RODGER, THE WOODEN WORLD: AN ANATOMY OF THE GEORGIAN NAVY 218-19 (1986); JAMES E. VALLE, ROCKS AND SHOALS: NAVAL DISCIPLINE IN THE AGE OF FIGHTING SAIL 79 (1980).

80. VALLE, *supra* note 79, at 83.

81. *See generally* THE PAPERS OF THE CONTINENTAL CONGRESS 1774-1789 (1978).

82. An Act for the Government of the Navy of the United States ch. 24, art. 47, 1 Stat. 713 (1799).

courts-martial with the power to impose substantial confinement.

Question Two:
Is a Mechanism Already in Place for an Accused to Secure the Desired Procedural Protection Through the Election of Another Forum?[83]

One of the reasons the *Middendorf* Court was less than sympathetic to the petitioner's due process claim was that the petitioner could have refused trial by summary court-martial when he was denied the right to assistance of counsel. He retained (and waived) the right to be tried in a higher forum with the assistance of counsel.[84] This same principle will usually apply when the accused faces a summary court-martial and when the accused faces nonjudicial punishment under Article 15, UCMJ, and is not attached to a vessel.[85] Unlike the accused at a nonjudicial punishment proceeding or summary court-martial, the accused at a SPCM may not secure the benefits of a larger panel by electing to proceed at a forum with greater protections—in this case, a GCM.[86]

Question Three:
What Effect Would the Desired Procedural Protection Have on the Ability of the Military to Efficiently and Appropriately Discipline Its Members?[87]

The answer to this question does not require speculation. The military justice system functioned well from 1916 to 2002 when the jurisdictional maximum term of confinement of the SPCM was set at six months.[88] When Congress amended Article 19, UCMJ, the military justice system was experiencing significant reductions in the number of all types of courts-martial.[89] If the jurisdictional maximum term of confinement of the SPCM is restored to its previous limit of six months, the military justice system will presumably function as it had from 1916 to 2002. Likewise, the degree of protection afforded an accused before 2002 will be restored.

Question Four:
Do Other Protections Already in Place Sufficiently Safeguard the Interest of the Accused That Would Be Advanced by the Questioned Procedural Protection?[90]

The interest of the accused advanced by a five-member panel—particularly where more than six months of confinement is at stake—is nothing less than an interest in an accurate determination of guilt or innocence. A larger panel is proportionally more likely to reach an accurate determination about the guilt of the accused.

During the past forty years, the Supreme Court has recognized the importance of panel size, group psychology, and statistics in the context of jury group dynamics. In *Ballew v. Georgia*,[91] the Court addressed the effect panel size has on the reliability of verdicts. The Court noted a positive correlation between group size and the quality of both group performance and group productivity. Citing studies by social scientists, the Court credited a variety of possible explanations for this conclusion.[92] One study cited by the Court found that the smaller the group, the less likely members are to make critical contributions necessary for the solution of a given problem. The Court further observed that the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result. When the Court compared studies of individual and

83. *See* Middendorf v. Henry, 425 U.S. 25, 46-47 (1976).

84. *Id.*

85. *See* MCM, *supra* note 8, R.C.M. 1303; UCMJ art. 15(a) (2002).

86. *See* MCM, *supra* note 8, R.C.M. 404(d), 601.

87. *Middendorf*, 425 U.S. at 45-46.

88. Articles of War of 1916, ch. 418, § 3, art. 13, 39 Stat. 652 (1916).

89. *Compare Report of the Judge Advocate General of the Army, October 1, 1989, to September 30, 1990*, 32 M.J. CXLVII, CLXI (1991), *with Report of the Judge Advocate General of the Army, October 1, 1999, to September 30, 2000*, 54 M.J. CXXI, CXXXI (2001) (reflecting a 49% decrease in total courts-martial); *compare Annual Report of the Judge Advocate General of the Navy Fiscal Year 1990*, 32 M.J. CLXIII, CLXXV (1991), *with Annual Report of the Judge Advocate General of the Navy for October 1, 1999 to September, 30 2000*, 54 M.J. CXXXV, CXLVII (2001) (reflecting a 47% decrease in total courts-martial); *compare Report of the Judge Advocate General of the Air Force, October 1, 1989 to September 30 1990*, 32 M.J. CLXXVII, CLXXXVIII (1991), *with Report of the Judge Advocate General of the Air Force, October 1, 1999 to September 30, 2000*, 54 M.J. CXLIX, CLXIII (2001) (reflecting a 40% decrease in total courts-martial); *compare Report of the Chief Counsel of the U.S. Coast Guard, October 1, 1989 to September 30, 1990*, 34 M.J. CXCI, CXCVII (1991), *with Report of the Chief Counsel of the U.S. Coast Guard, October 1, 1999 to September 30, 2000*, 54 M.J. CLXV, CLXXIV (2001) (reflecting a 57% decrease in total courts-martial).

90. Weiss v. United States, 510 U.S. 163, 179-81 (1994).

91. 435 U.S. 223 (1978) (holding that five-person juries violate the constitutional right to trial by jury).

92. *Id*. at 232-34.

group decision-making, it saw that groups performed better because the prejudices of individuals were frequently counterbalanced, resulting in greater objectivity. Groups also exhibited more self-criticism. Most of the advantages possessed by groups tended to diminish as group size diminished.[93] Applying these principles to civilian juries, the Court held that the benefits of larger groups were important, particularly the counterbalancing of various biases among the members of the group.[94]

The Court went on to find that as group size diminishes, the resultant increase in the rate of error does not affect the government and the accused equally.[95] Rather, due to psychology, human dynamics, and the increased importance society places on protecting the innocent accused from wrongful conviction, the accused disproportionately bears the risk of error. The *Ballew* Court looked further to social science, expressing doubts about the fairness to defendants of the results achieved by smaller panels.[96] The Court cited statistical studies suggesting that the risk of convicting an innocent person rises as the size of the jury diminishes.[97] Because the risk of acquitting a guilty person increases with the size of the panel, an optimal jury size could be seen as a function of the comparative undesirability of the two risks. After weighting the risk of wrongful conviction as ten times more significant than the risk of wrongful acquittal, one study cited by the Court concluded that the optimal jury size was between six and eight. As panel size diminishes to five or fewer, the risk of wrongfully convicting an innocent defendant increases.[98] Coincidentally, the Supreme Court's use of comparative weighting of competing risks applies precisely to trials at which more than six months of confinement is at stake; potential confinement of less than six months does not implicate the right of a civilian defendant to a jury trial.[99]

Thus, civilian scholars and the Supreme Court have relatively recently recognized the benefits of large panels, even as the military has retreated from their use. The benefit of the large panel is an accurate result; this is the specific interest that the use of larger panels advances within the framework of a due process analysis.

No other procedural protection sufficiently safeguards the accused's interest in a reliable result by compensating for the loss of the five-member panel in cases where more than six months of confinement is at stake. While some benefit may accrue to an accused due to the Article 25, UCMJ, selection criteria in comparison to civilian juries,[100] the vote of only two of the three members is sufficient to find an accused guilty of an offense.[101] Indeed, the homogenous nature of the military officer corps and the lack of a unanimity requirement may particularly necessitate a larger panel size to gain the benefits cited in *Ballew*, such as the counterbalancing of individual prejudices.[102]

Fundamental Fairness of the New Special Court-Martial

Although this article has evaluated all four factors the Supreme Court has previously used to evaluate military procedures under the Due Process Clause of the Fifth Amendment, a broader look at the overall fairness of the new SPCM is in order. The Court has not used any of the four factors more than once; however, when one reads the opinions more broadly, the Court has repeatedly concerned itself with the overall fairness of the military system. The *Middendorf* Court's concern with whether an accused could obtain the right to counsel through a forum election,[103] and the *Weiss* Court's willingness to consider alternative procedures to guarantee judicial independence[104] indicate that the Court will take a pragmatic approach to the question of due process. Procedures which, when taken as a

93. *Id*. at 233.

94. *Id*. at 232-34.

95. *Id*. at 234.

96. *Id*.

97. *Id*. at 234-35.

98. *Id*. at 234.

99. Baldwin v. New York, 399 U.S. 66, 71 (1970).

100. Convening authorities are required to detail members who are, in the opinion of the convening authority, "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." UCMJ art. 25(d)(2) (2002).

101. UCMJ art. 52(a)(2); *cf*. Burch v. Louisiana, 441 U.S. 130 (1979) (requiring a unanimous verdict when the jury consists of only six members).

102. Ballew v. Georgia, 435 U.S. 223, 232-35 (1978); *see supra* notes 91-99 and accompanying text.

103. Middendorf v. Henry, 425 U.S. 25, 46-47 (1976).

104. Weiss v. United States, 510 U.S. 163, 179-81 (1994).

whole, seem fundamentally fair to the Court are more likely to survive a Due Process Clause challenge, particularly if they enjoy the sanction of history.

The infirmities inherent in small panels do not merely result in the technical violation of a supposed constitutional right, but rather in a fundamentally unreliable, unfair result.[105] Under the new SPCM, the use of three-member panels extends for the first time into that class of crimes the Supreme Court has deemed to be non-petty crimes. The Court defines non-petty crimes as those for which more than six months of confinement is authorized.[106] The Supreme Court has held that defendants accused of non-petty crimes must be given the opportunity to be tried by a jury of sufficient size to produce a reliable result.[107] Until the recent expansion of the jurisdictional maximum of the SPCM, the use of the three-member panel paralleled civilian practice; it was restricted to those crimes which were insufficiently "serious" to trigger the right to a jury trial had they been tried by a civilian court.[108] Service members facing the possibility of conviction for an offense the Supreme Court classifies as non-petty were previously entitled to the larger and more reliable panel associated with the GCM. As a matter of fundamental fairness, service members are entitled to the accurate determination of their cases. This requires panels of sufficient size to produce reliable results, especially when the offense carries such potential confinement as to be considered non-petty.[109]

Overcoming the Balance Struck by Congress

The Supreme Court will not evaluate the factors favoring the use of larger panels in isolation. Rather, the Court will examine them in light of whether they "are so extraordinarily weighty as to overcome the balance struck by Congress."[110]

As was discussed at the beginning of the analysis, courts have traditionally deferred to Congress when reviewing legislation affecting the armed forces.[111] Congress passed the amendment to Article 19, UCMJ, as part of the annual Defense Authorization Bill.[112] The statute's legislative history does not contain any findings or discussion regarding the reason Congress increased the jurisdictional maximum of the SPCM. The lack of congressional findings or relevant legislative history makes reviewing and assigning weight to the balance struck by Congress somewhat more difficult.[113] Nonetheless, courts must evaluate the policy decision to provide for smaller panels and weigh the decision against the factors militating against the new SPCM.[114]

In the absence of direct evidence of the reasoning behind Congress's legislative judgment, courts may reasonably suppose that Congress intended to avail the military of the obvious benefits that would directly accrue from the amendment of Article 19. The obvious benefit of the amendment raising the jurisdictional maximum punishments of the SPCM relates to judicial economy. Commanders who wish to subject service members to the possibility of longer terms of confinement no longer have to formally investigate alleged offenses pursuant to Article 32, UCMJ.[115] They no longer must be advised by a staff judge advocate regarding the appropriateness of a court-martial as provided by Article 34, UCMJ.[116] Lower-ranking commanders now have the option of subjecting service members to a greater potential term of confinement, as the convening authority will no longer generally be required to be a flag or general officer.[117] All of these factors provide for the more efficient administration of military justice, insofar as justice is always administered more efficiently when the procedural safeguards to the accused are reduced. Recent court-martial trends do not reveal any developments that would specially indicate the need

105. *See Ballew*, 435 U.S. at 232-33.

106. Baldwin v. New York, 399 U.S. 66, 70-71 (1970).

107. *See id.*; *Ballew*, 435 U.S. at 232-33.

108. Cheff v. Schnackenberg, 384 U.S. 373 (1965).

109. *See Weiss*, 510 U.S. at 178; *Ballew*, 435 U.S. at 233-34.

110. Middendorf v. Henry, 425 U.S. 25, 43 (1976); *Weiss*, 510 U.S. at 177-78.

111. *See supra* notes 23-26 and accompanying text.

112. *See* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512 (1999).

113. *See* United States v. Lopez, 514 U.S. 549, 563 (1995) (noting that a lack of congressional findings posed a difficulty to the Court in its evaluation of legislative judgment).

114. *Middendorf*, 425 U.S. at 43.

115. UCMJ art. 32 (2002).

116. *Id.* art. 34.

117. *See id.* art. 23.

for a more efficient application of military justice. In fiscal year 2000, the armed forces tried over fifty percent fewer special and general courts-martial than in fiscal year 1990. The percentage of SPCMs using members also decreased during this period.[118] In short, no identifiable rationale exists for this amendment, except for a generalized and abiding congressional interest in increased efficiency of criminal trials.

Against this generalized desire for ever-greater expediency, courts must weigh the cost in justice of abandoning larger panels that have protected service members from unjust punishment for centuries, and whose value has recently been confirmed by social science and accepted by the Supreme Court.[119] The right of service members to fair trials significantly outweighs the desire for expediency. The desire to dispose of cases with a minimum expenditure of time and resources cannot outweigh the factors—rooted both in history and modern understandings of justice—that militate in favor of limiting the use of SPCM panels to cases where no more than six months of confinement is at stake.

Conclusion

Although many probably viewed the expansion of SPCM jurisdiction as a step toward greater similarity between the civilian and military justice systems, the use of three-member panels to convict and sentence an accused to a year of confinement marks a new low in the protection of the military accused. Using the Supreme Court standard for evaluating Due Process claims in the court-martial context, the new SPCM violates the accused's right to due process of law. The use of small panels in this manner is unprecedented in the long tradition of Anglo-American courts-martial. Because of the small size of SPCM panels, the distinction between SPCMs and GCMs is more analogous to the difference between petty and non-petty offenses, rather than the distinction between misdemeanors and felonies. Service members facing more than six months of confinement deserve to have their cases tried by larger—and therefore more reliable—panels. The accused's right to the fair adjudication of his case substantially outweighs the speculative, generalized interest in increasing efficiency that the new SPCM appears intended to advance.

118. *See supra* note 89.

119. Ballew v. Georgia, 435 U.S. 223, 232-34 (1978).